Supreme Court, U.S.
FILED
JAN 4 - 2011
OFFICE OF THE CLERK

No. 09-1343

IN THE

Supreme Court of the United States

J. McINTYRE MACHINERY LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

REPLY BRIEF ON THE MERITS

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ARGUMENT

I. THIS COURT'S JURISPRUDENCE DICTATES REVERSAL.

Under this Court's Fourteenth Amendment due process regime, New Jersey has no adjudicative jurisdiction over J. McIntyre Machinery Ltd ("J. McIntyre"), a corporation that "has no contacts, ties, or relations" with New Jersey. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). The New Jersey Supreme Court, realizing that J. McIntyre had no "minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case," concluded that the only way to hale J. McIntyre into its courts was to discard as "outmoded" this Court's enduring minimum contacts test, the "constitutional touchstone" of personal jurisdiction analysis. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 108 (1987) (O'Connor, J., concurring).

Respondents try to paper over the New Jersey Supreme Court's abandonment of this Court's minimum contacts test with scattered fragments of language pulled from this Court's decisions. They fail.

A. Territoriality Is The Operative Principle Applied By This Court To Effect Fourteenth Amendment Due Process Rights.

Respondents argue wrongly, that territoriality was previously dispensed with. Resp. Br. 42-43. While "presence," "as the standard for measuring the extent

of state judicial power over . . . corporations," *McGee v. International Life Ins.*, 355 U.S. 220, 222 (1957), is now gone for specific jurisdiction, territoriality is not. Respondents incorrectly equate territoriality with federalism and argue that this Court has replaced federalism with personal liberty. Resp. Br. 42-46. This Court has identified both federalism and liberty as sources of the due process right, but both are effected by the application of territoriality. Justice O'Connor in *Asahi* "reaffirmed" the "oft-quoted reasoning of *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), that minimum contacts must have a basis in some act by which the defendant purposefully avails itself of the privilege of conducting activities *within the forum State* . . ." *Asahi*, 480 U.S. at 109 (emphasis added) (quotation omitted).

Throughout this Court's history of determining the scope of state in personam jurisdiction, the state not the United States—has been the defining unit. *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 943 (4th Cir. 1994).

Respondents mischaracterize as "dicta" the reliance in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), on territoriality and purposeful availment. Resp. Br. 45. In *World-Wide Volkswagen*, this Court entered into a detailed discussion of the territorial principles of modern jurisdiction, citing to the reliance in *Hanson* on "interstate federalism." 444 U.S. at 293-94. "*Applying these principles* to the case at hand," this Court held that there was an absence of "affiliating circumstances" that would justify Oklahoma's exercise of jurisdiction over a foreign defendant. 444 U.S. at 295 (emphasis added).

Whatever the source of the due process right under the Fourteenth Amendment, "the requirement that there be minimum contacts between the nonresident defendant and the forum state" is not altered. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n. 10 (1982) (quoting *World Wide Volkswagen*, 444 U.S. at 291-92).

B. The Adoption Of A National Contacts Test Or A Convenient Forum Test Would Require Rejection Of This Court's Jurisprudence.

Respondents offer only that J. McIntyre had contacts with the territory of the United States. Resp. Br. 9, 17, 19, 20.

1. *National contacts*

Respondents ask this Court to radically revise the test for personal jurisdiction over a foreign manufacturer to inquire only whether the defendant marketed "directly or indirectly" to all fifty of the United States. *Id.* at 27. Respondents seek the adoption of a *national* contacts test that is both unsound and inconsistent with this Court's jurisprudence.

As outlined by Justice O'Connor in *Asahi*, 480 U.S. 113 n., a national contacts test would be for Congress to establish by vesting jurisdiction over foreign defendants in federal district courts, and judged under the Fifth Amendment. *Cf.* Fed. R. Civ. P. 4 (k)(2); *and see* Chamber of Commerce Amicus Br. 19-21. National contacts have never been adopted by this Court as a basis for jurisdiction under the Fourteenth Amendment, which

requires contacts between the defendant and the forum state. When this Court was given the opportunity to apply a national contacts test in *Asahi*, both pluralities applied, as a "constitutional touchstone," the state-centric minimum contacts test, and analyzed only Asahi's contacts with the state of California, not the Nation as a whole. *Asahi*, 480 U.S. at 112-13, 121.

2. *Convenience*

In addition to "national contacts," Respondents argue for adjudicative jurisdiction based upon "convenience" to the plaintiff, not necessity, an argument drawn from Justice Brennan's dissent from over thirty years ago in *Shaffer v. Heitner*, 433 U.S. 186 (1977), and from his dissents, written together, to *World-Wide Volkswagen* and *Rush v. Savchuck*, 444 U.S. 320 (1980). Resp. Br. 48 n. 18, 49 n. 19; *see also* Ja196a; Plaintiffs' Appellate Division Appx. (2/20/07) at Pa229 (Tr., Motion to Dismiss, 11/03/03). Justice Brennan would have abandoned *International Shoe* and forum state contacts, and focused instead on the plaintiff. *See Shaffer*, 433 U.S. at 219; *World-Wide Volkswagen*, 444 U.S. at 299. This Court rejected Justice Brennan's views. In *Shaffer*, this Court refused to alter the focus on the putative defendant and its ties to the forum state, reaffirming its holding in *Hanson*, 357 U.S. at 254, that a state does not acquire jurisdiction "by being the 'center of gravity' of the controversy or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law." *Shaffer*, 433 U.S. at 215.

This Court rejected the plaintiff-centric approach in both *Savchuk*, 444 U.S. at 332 (the "subtle shift in focus from the defendant to the plaintiff" is "forbidden by *International Shoe* and its progeny"), and in *World-Wide Volkswagen*, listing each of Justice Brennan's reasons for changing this Court's personal jurisdiction jurisprudence: "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." 444 U.S. at 294 (citation omitted).

Respondents seek adoption of dissents that were later abandoned by Justice Brennan himself in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985). Respondents ask this Court to change the understanding of the Constitution to validate their choice of venue, even as their claim is now pending in their second choice, the United Kingdom.

II. RESPONDENTS EITHER MISUSE OR IGNORE PRECEDENT.

A. Respondents Ignore Purposeful Availment.

Respondents address "purposeful availment" largely by ignoring it. They argue around, but never specifically assert, that J. McIntyre purposefully availed itself of the privilege of conducting activities within New

Jersey. The purposeful availment claimed is of "all fifty states." Resp. Br. 9, 17.

B. Respondents Misconstrue The Facts Of *Asahi* As Law And Pull Facts Out Of Context.

Respondents misuse Justice O'Connor's *Asahi* opinion to squeeze the facts of this case into "additional contacts." *See* Resp. Br. 24-26. That opinion can fairly be divided into four parts. First, Justice O'Connor provides a comprehensive detailing of this Court's principles of adjudicative jurisdiction. *Asahi*, 480 U.S. at 108-10. Justice O'Connor then describes the split among courts on jurisdictional approaches, including the mere flow of goods into the United States as a predicate for jurisdiction. *Id.* at 110-12. Next, Justice O'Connor rejects the national contacts test and sets forth a rule of law, heavily reliant on *Burger King*, that is "consonant with the requirements of due process": "The 'substantial connection' . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*" *Id.* at 112 (emphasis in original) (internal citation omitted). Justice O'Connor states that placement of a product into the stream of commerce does not meet the rule of law, and gives examples of conduct that may. *Id.*

Finally, Justice O'Connor applies the law to the facts and concludes that respondents "have not demonstrated any action by Asahi to purposefully avail itself of the California market." *Id.* at 112. This topic sentence is followed by a five-sentence recitation of facts. "On the basis of these facts, the exertion of personal jurisdiction

over Asahi by the Superior Court of California exceeds the limits of due process." *Id.* at 113.

The test set forth in the third part of Justice O'Connor's opinion is: a substantial connection must exist between the defendant and the forum state (not between defendant and the United States) and "must come about by *an action of the defendant purposefully directed toward the forum state.*" *Id.* at 112 (emphasis in original). The actual test is never quoted by Respondents because they cannot meet it. The test Justice O'Connor posits inhabits one paragraph, and it is dispositive. Justice O'Connor achieves clarity through the rhetoric of repetition. The paragraph has but four sentences, yet the phrase "the forum state" appears ten times. *Id.* In each of the three sentences that follow the topic sentence, one phrase is repeated, always at the end: "an action of the defendant purposefully directed toward the forum State," "an act of the defendant purposefully directed toward the forum State," "an act purposefully directed toward the forum State." *Id.*

Respondents wrongly claim that a statement of fact in the fourth part—"[Asahi] did not create, control, or employ the distribution system that brought its valves to California"—is "additional conduct" in part three. Resp. Br. 23, 24-25.

Respondents argue that because the distributor "effectively served" as Petitioner's "sales agent to New Jersey and every other state in the United States," Petitioner fell within the example of conduct of "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."

Resp. Br. 25-26. That reading guts Justice O'Connor's dispositive paragraph of meaning.

C. Respondents Attempt To Redefine *World-Wide Volkswagen's* Central Holding, Which Reaffirmed *Hanson*.

Respondents ask this Court to focus on three words in *World-Wide Volkswagen*, 444 U.S. at 297: "directly or indirectly." Resp. Br. 20, 21. The words appear in the middle of a three-sentence paragraph of the decision that begins by stating the *Hanson* test: "purposefully avails itself of the privilege of conducting activities within the forum State." *Id.* at 297-98. The paragraph ends by employing the words "with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297 (quoting *Hanson*, 357 U.S. at 253). The context renders the meaning plain: a manufacturer can be subject to jurisdiction as long as it purposefully conducts activities within the forum state either itself or, acting as a primary participant, by purposefully directing the actions of another within the forum state. *See id.* at 297-98; *see also Burger King*, 471 U.S. at 480 n. 22.

III. THE RECORD FACTS AND LAW DO NOT AID RESPONDENTS IN OBTAINING JURISDICTION.

Respondents argue that the record allows exercise of jurisdiction over J. McIntyre under this Court's jurisprudence. Resp. Br. 14-20. There is no evidence that Petitioner, or anyone at its direction, sold or marketed any products directly or indirectly into New Jersey.

A. The Only Evidence Of The Transaction At Issue Discloses No Contact By Petitioner With New Jersey.

The sale of the subject 640 shear to Mr. Nicastro's employer, Curcio Scrap Metal, was in August 1995. The totality of record facts related to that shear and that sale can be found in one invoice, JA43a, and three certifications: by Frank Curcio, JA77a-79a, and Jason Midgley and Sally Johnson of Petitioner. JA21a-25a; JA82a-87a.

Petitioner's distributor purchased the shear from Petitioner. JA22a. After his father heard of the machine from a booth exhibit at a convention in Las Vegas, Michael Curcio ordered the machine from the distributor in Ohio. JA78a. The machine was sold by the distributor to Curcio, F.O.B. Stow, Ohio, per an invoice dated August 25, 1995. JA43a.

There is no record evidence that Frank Curcio met anyone at the booth, either from Petitioner or the distributor. There is no record evidence that anyone marketed into New Jersey, either Petitioner or the distributor. There is no record evidence that anyone solicited anyone in New Jersey for the sale.

Not only is there no record evidence that Petitioner knew of the sale to the employer, there is affirmative evidence that Petitioner did not know who the distributor's customers were. The distributor refused to give up its customer list. JA85a.

Respondents agree that the transactions at issue were a sale (not a consignment) by Petitioner to the distributor and another by the distributor to Respondents' employer. Respondents stated to the New Jersey Supreme Court that "these large industrial machines [] were built on a per order basis." JA189a; *accord*, Resp. Br. 3 (stating as an unqualified fact that the machines "for sale by" the distributor were built "only after" the distributor "received firm orders for those products."); Brief in Opposition to Defendant's Motion to Dismiss, Superior Court of New Jersey (10/11/06) at 19-20. Furthermore, the distributor is known to be substantially engaged in selling the goods of J. McIntyre. *See* Ohio Rev. Code. Ann. §1303.102(20)(a)(iii) (2010).

"All [the distributor] said was, here is an order, deliver it to me in Ohio, and it was delivered in Ohio, at which point [the distributor] shipped it to New Jersey." JA189a-190a.

B. Respondents Wrongly Claim That Four 640 Machines Were Sold Into New Jersey; The Record Is That Only One Was, This One.

Respondents assert, without support, that "[a]t least four model 640 machines were sold into New Jersey." Resp. Br. 6. The report of the private investigator, upon which they rely, is unsworn and based upon hearsay. JA140a-44a. Besides the model 640 shear purchased by Curcio, the only other J. McIntyre machine the investigator alleges he was able to verify existed in New Jersey was owned by Cinelli Scrap Metal. The record does not disclose that that machine was "sold into New Jersey."

What is presented in the record before this Court is a single act directed toward New Jersey and only by the distributor: shipping a shear to fulfill an order made to the distributor. Petitioner did nothing to direct the sale and had no knowledge that the machine was sent to New Jersey. *See Burger King*, 471 U.S. at 480 n. 22 (quoting *Calder v. Jones*, 465 U.S. 783, 790 (1984)).

C. The Distributor's Single Sale Of One Product Into New Jersey Cannot Establish New Jersey's Jurisdiction Over J. McIntyre.

This is a single act case, and a single act may not be enough to create jurisdiction. *See Burger King*, 471 U.S. at 476 n. 18. The record is devoid of evidence that the distributor ever sold another J. McIntyre machine into New Jersey or marketed to New Jersey in any fashion. Even as to the sole machine sold into New Jersey, there is no record evidence of pre-sale negotiations or post-sale service. The distributor's "affiliation with the forum" could not be more "attenuated." *Id.* The absence in the record of prior negotiations and contemplated future consequences renders personal jurisdiction over even the distributor a substantial issue. *Id.* at 478-79.

"In short," to employ the language of *World-Wide Volkswagen*, 444 U.S. at 295, "respondents seek to base jurisdiction on one isolated occurrence": a single sale by an independent distributor made by it to New Jersey. If the record does not establish jurisdiction over the distributor, it certainly cannot over Petitioner.

D. Respondents Do Not Challenge The Finding That Petitioner And Its Distributor Were Distinct And Independent In Operation And Control.

"J. McIntyre and its American distributor were distinct corporate entities, independently operated and controlled without any common ownership." So found the New Jersey Supreme Court. Pet. App. 7a. Respondents ignore that finding.

Petitioner's contacts with New Jersey "must be assessed individually." *Calder*, 465 U.S. at 790; *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984). The only record activity directed at New Jersey was the fulfillment of an order, an activity that Petitioner did not direct (much less purposefully, *see Burger King*, 471 U.S. at 480 n. 22), and whose destination Petitioner did not know. JA85a. There is no record evidence that the distributor directed any marketing at the forum state. But there is record evidence, from an undated letter, that the distributor alone paid at least $350,000 in advertising and other costs, and that the distributor handled machinery repairs and warranty issues without monetary assistance from Petitioner. JA126a.

E. New Jersey Substantive Law Allows Suit Against A Distributor.

The law professor amici, brief at 3, wrongly assert that reversal would immunize manufacturers from jurisdiction in any state. Where a United States distributor sells a product made by a foreign

manufacturer, the distributor can be held to account in this country for a product liability claim, and by indemnification, so can the manufacturer. *See* PLAC Amicus Brief at 23-24. Foreign manufacturers routinely use far more sophisticated operations than a "scheme" of one distributor and periodic attendance at trade shows in the United States, with no demonstration of harm to Americans' interest in seeking recourse. The system works.

Respondents do not argue that the bankruptcy of the distributor in this case should change the law or affect the result of this case. It should not. It belies common sense to believe that foreign manufacturers choose distributors that will not pay their bills.

Respondents named the distributor in their New Jersey suit, claiming that it is "strictly liable in tort" to Respondents. JA6a-9a. Under New Jersey law, a distributor can be held strictly liable to Respondents for injuries caused by defective products.

The distributor is a product "seller" for purposes of New Jersey's product liability law and, where the product manufacturer is not available, the product seller remains liable. N.J. Stat. Ann. §2A:58C-8, 9 (2010); *Promaulayko v. Johns Manville Sales Corp.*, 116 N.J. 505, 511, 562 A.2d 202, 205 (1989).

IV. NOTICE OF ADJUDICATIVE JURISDICTION IS CREATED WHEN AN ECONOMIC ACTOR TAKES A CONCRETE ACT DIRECTED AT THE RESIDENTS OF THE FORUM STATE.

Beginning with their restatement of the Question Presented, Respondents argue for a forseeability test that is purely causal: delivery of products into a national market "with the foreseeable consequence" of purchase in any state, including New Jersey. Resp. Br. 14, 17, 20.

Causation is not enough. "Of course, the mere forseeability of an event in another state is 'not a sufficient benchmark for exercising personal jurisdiction.'" *Lebel v. Everglades Marina, Inc.*, 115 N. J. 317, 324, 558 A.2d 1252, 1255 (1989) (quoting *Burger King*, 471 U.S. at 474). In *Burger King*, this Court stated that in defining "reasonably anticipate" it "frequently has drawn from the reasoning of *Hanson*," that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." 471 U.S. at 474-75.

"Clear notice" is just another term for "reasonably anticipate," and it, too, arises from purposeful availment. *World-Wide Volkswagen*, 444 U.S. at 297. Respondents spend six pages claiming that fair warning arises from cases from courts other than this Court, which have adopted a "should have known" test, and the fact that Petitioner had been sued in states other than New Jersey. Resp. Br. 30-35; *and see Whitaker v. J. McIntyre Machinery, Ltd*, No. 2003-CA-001429-MR, 2004 WL 1586989 (Ky. App. Ct. July 16, 2004) (J.

McIntyre dismissed because the statute of limitations expired). A Nottingham, England company is not, and should not be, required to have a constitutional lawyer on retainer to evaluate the plethora of lower court personal jurisdiction cases as they arise.

Nor is personal jurisdiction jurisprudence decided by "consensus," whatever that means. Resp. Br. 35. It is decided by this Court. As the New Jersey Supreme Court recognized: "It seems that little profit can be gained from an extended analysis of Supreme Court doctrine until the Court itself draws the lines as the umpire of federalism." *Lebel*, 115 N.J. at 319, 558 A.2d at 1253.

Alas, Respondents do not find a place in their narrative of "consensus" for *Bendix Autolite v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988), where this Court reaffirmed state minimum contacts, or Justice Stevens's statement that "the due Process Clause provides an important measure of protection for out-of-state defendants, especially foreigners." *American Dredging Co. v. Miller*, 510 U.S. 443, 462 (1994) (Stevens, J., concurring).

V. THIS COURT'S FOURTEENTH AMENDMENT PERSONAL JURISDICTION JURISPRUDENCE SHOULD BE PRESERVED.

For Respondents to prevail, this Court would have to re-write personal jurisdiction law. Nothing advanced by Respondents, their amici, or the court below, justifies that step.

A. No Justification Exists To Abandon This Court's Long-Settled Jurisprudence.

Respondents and amici cite no examples of failure of this Court's Fourteenth Amendment jurisprudence. Amicus American Association of Justice ("AAJ"), the renamed American Trial Lawyers Association, devotes a section of its brief to the influx into this country of products, but does not identify a single case where legal recourse was absent. If the issue is whether jurisdictional doctrine should be deracinated from the fixture of our Constitution, there ought to be some evidence that it is deeply flawed in practice. None is offered. Even in this case, Respondents do not allege (and did not below) that they lack recourse to American justice; they just want New Jersey justice.

Nevertheless, there exist separate, sound reasons that this Court should decline to follow the course urged by Respondents.

1. *The nature of our federal system is reason enough not to abandon this Court's jurisprudence.*

It is not an act of mere conceptualism to recognize, as this Court has in *Hanson* and its progeny, that the very nature of our federal system constrains the exercise of state adjudicatory jurisdiction. *See* John S. Baker, Jr. & Augustín Parise, *Conflicts in International Tort Litigation Between U.S. and Latin American Courts*, 42 Inter-American Law Review 101, 125 (forthcoming 2011). Adjudication of cases against foreign defendants poses a special risk in state courts which are prone to

give sway to local interests. *See The Federalist* No. 3, at 10 (John Jay) (Liberty Fund ed., 2001).

2. *The United States, not New Jersey, has responsibility for international commerce and its ramifications.*

In a bolder embrace of the central theme of the New Jersey Supreme Court than Respondents can muster, AAJ asserts that because "we live in a truly global economy," the law should "evolve," meaning that this Court should change its views of due process rights so that state courts have more power. AAJ Br. 6. This is wrong on many fronts: it uses catch-phrases in place of analysis, and ignores the locus of responsibility for responding to a "global" economy, the United States Government.

a. *"Globalization" is an unexamined premise.*

Every generation, it seems, claims to be living in a radically changing world. Change is always with us, but perhaps the most dramatic change in the last several years has been the increase in unexamined assertions of encroaching globalization. America has faced new eras of globalization almost as many times as America has lost its innocence. Such frequent claims need to be examined critically, including the "simplistic misreadings of complex historical, social, and economic realities . . ." Vaclav Smil, *Prime Movers of Globalization: The History and Impact of Diesel Engines and Gas Turbines* 1 (The MIT Press 2010).

Not only do Respondents' amici and the lower court not understand "globalization," they have the timing wrong. The impulse of humans to explore new worlds is not new to our era, nor is the corporate modality through which we organize our explorations. *See, e.g.*, Peter C. Newman, *Empire of the Bay: The Company of Adventurers That Seized A Continent* (Penguin 2000). The two prime movers of the modern global economy are the internal-combustion engine, commercialized in the 1890s, and the gas turbine, successfully designed in the 1930s. Smil, *supra*, at 17. By the early 1950s "the design and production of diesel engines were mature enterprises." *Id.* at 110. The best-selling jetliner in history, the Boeing 737, first flew in 1968. *Id.* at 100.

b. *Foreign trade is a matter within the exclusive constitutional competence of the United States Government.*

Goods and people can travel overseas, but whether and how to allow them into the United States is the exclusive province of the national sovereign. *See American Ins. Ass'n. v. Garamendi*, 539 U.S. 396, 417 (2003).

For over sixty years, Congress and successive Presidents adopted measures to advance the interests of this country and its citizens through a liberalized trade policy. The United States entered the General Agreement on Tariffs and Trade ("GATT") in 1948, participated in GATT rounds in 1947, 1949, 1951, 1956, 1960-1961, 1964-1967, 1973-1979, and 1986-1994, and enacted the 1962 Trade Expansion Act, establishing

trade adjustment assistance ("TAA"). *See* Todd Tucker & Lori Wallach, *The Rise and Fall of Fast Track Trade Authority* 27-101 (Public Citizen's Global Trade Watch 2009), *available at* http://www.fasttrackhistory.org/TheRiseAndFallOfFastTrack.pdf. Congress passed the Trade Reform Act of 1974, expanding executive authority to negotiate non-tariff trade issues such as government procurement regulations, customs procedures, domestic health and sanitation laws, meat-safety and inspection regulations, and "Buy American" rules, and enabling the adoption of trade remedies. *See id.* at 1-6, 53-78. The North American Free Trade Agreement took effect on January 1, 1994 and the United States entered the WTO on January 1, 1995. *Id.* at 85-93. Congress approved the Central American Free Trade Agreement in 2005. *See* J.F. Hornbeck, Congressional Research Service, *CRS Report for Congress: The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)* 1-3 (Jan. 16, 2008), *available at* http://www.nationalaglawcenter.org/assets/crs/RL31870.pdf.

Congress provides varied remedies for industries and workers. William H. Cooper, Congressional Research Service, *CRS Report for Congress: Trade Remedy Law Reform in the 108th Congress* 2 (July 22, 2003), *available at* http://fpc.state.gov/documents/organization/23369.pdf; Jeffrey Salzman, Social Policy Research Associates, *Rapid Response and TAA* 2 (2009), *available at* http://wdr.doleta.gov/research/FullText_Documents/Rapid%20Response%20and%20TAA%20-%20Final%20Report.pdf. TAAs were expanded in the Trade Reform Act of 1974, the Omnibus Trade and Competitiveness Act of 1988, the

Trade Act of 2002, and the Trade and Globalization Adjustment Assistance Act of 2009. *Id.* at 2-4. The International Trade Commission has the power "to issue an exclusion order and/or a cease-and-desist order against imports that it has determined are sold in the United States through unlawful methods of competition or sale or the products of intellectual property rights infringements." *Id.* at 2 n.1.

Foreign trade and its impact on our people are for the United States Government alone to determine.

c. *This Court should not change the law to accommodate protectionism.*

Amicus AAJ makes explicit what animates the desire to dismantle constitutional protections for foreign defendants: the claim that millions of products are brought into the United States, and they bring danger with them. AAJ Br. 9. First, the dangerous instrumentality concept is irrelevant to jurisdiction. *See World-Wide Volkswagen*, 444 U.S. at 296 n. 11. Second, Congress can and has responded to potential import danger, most recently, by enacting the FDA Food Safety Modernization Act. *See* S.510, 111th Congress, Title III, Improving the Safety of Imported Food.

If Americans require special protection from the flow of products into this country that Congress and the Executive have deemed to be in the national interest, then Congress and the Executive are the constitutionally competent authorities to act. States are not entitled to their own foreign policy.

B. This Court's Fourteenth Amendment Jurisprudence Advances The Interests of Justice.

Even if this Court were to start afresh to fashion a jurisprudence of personal jurisdiction, it ought to end up right where *Burger King* and Justice O'Connor in *Asahi* led us: a putative defendant can be brought before a state court only if that person exhibits a form of consent by deliberately taking a concrete act purposefully directed toward the residents of another state and a substantial connection has been created thereby. At that point, it is fair and just to hold that person to account in a suit arising out of the defendant's activity directed at the state.

That rule appropriately protects economic actors, especially foreign defendants, in facing a civil justice system that includes fifty state court systems of enormous diversity. New York has its Civil Practice Law and Rules, a liberal interlocutory appeal rule, and no codified rules of evidence. Pennsylvania allows a plaintiff to commence an action without a complaint. Delaware and New Jersey preserve the division between law and equity. Some states have business courts, others not. New Hampshire allows advisory opinions. Funding of courts and the salaries paid to judges are a matter for the states. So, too, are judicial elections, both into office and out. *See, e.g.*, James Sample, et. al., *The New Politics of Judicial Elections 2000-2009* (Brennan Center for Justice, August, 2010). The diversity is engrained in our federal system and only rarely has this Court stepped in. *See, e.g., Caperton v. A.T. Massey Coal Co., Inc.*, U.S. , 129 S.Ct. 2252 (2009); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1980); *cf. Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

Justice O'Connor understood that a more permissive jurisdictional regime for foreign defendants required a judicial system without the differences that pervade the state court systems. *Asahi*, 480 U.S. at 113 n. That is why any national contacts jurisprudence depends upon the employment of federal courts, where procedural and structural uniformity is the rule.

The consequences of having diverse state civil justice systems support this Court's insistence on special care in the exercise of jurisdiction over foreign defendants. *Id.* at 115; *American Dredging*, 510 U.S. at 462 (Stevens, J., concurring). However confusing state differences may be for a domestic economic actor, they will be that much more for a foreign corporation. That is also why this Court ought not to adopt the purposeful non-availment test of the New Jersey Supreme Court, even apart from the fact that it is directly contrary to this Court's jurisprudence. The amici States blame Petitioner for not doing research into New Jersey law before selling into the United States. States Br. 29. Purposeful non-availment would, thus, obligate foreign companies to engage in 50-state surveys, regularly updated. The constitutional rights of foreign defendants cannot be so conditioned. *Cf. Bendix Autolite*, 486 U.S. at 893.

The New Jersey Supreme Court's disregard of this Court's direction in *Asahi* and *American Dredging* to take special care, and the hostility to foreign defendants expressed by amici, particularly the States, States Br. 29, are deeply troubling. To ensure that special care is taken, *cf. American Dredging*, 510 U.S. at 469 (Kennedy, J., dissenting), this Court should consider placing protections in the rule of law itself.

VI. THIS COURT SHOULD ADOPT A RULE CONSISTENT WITH *BURGER KING* AND JUSTICE O'CONNOR'S OPINION IN *ASAHI*.

The amici States want no rules at all, just "a flexible approach . . . that allows courts to establish intent to serve the forum State market through consideration of the complete universe of relevant evidence." States Br. 21. But, "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp. v. Friend*, U.S. , 130 S.Ct. 1181, 1193 (2010). Such straightforward rules "also promote greater predictability," which "is valuable to corporations making business and investment decisions." *Id.* That "there will be hard cases," is no reason not to establish such a test. *Id.* at 1194.

A clear, rule-oriented test for specific jurisdiction is especially important for foreign corporations who must fashion their actions from a distance. *See* Linda J. Silberman, *Reflections on* Burnham v. Superior Court, 22 Rutgers L.J. 569, 576 (1991). Minimum contacts, as elaborated by this Court in *Burger King* and by Justice O'Connor in *Asahi*, meets those standards and the "test" of "reasonableness" does not. As a "free-form 'fairness' inquiry," a "tilt toward 'reasonableness' in all jurisdictional inquiries has been a litigation luxury" that we can no longer afford. *Id.* at 581, 583; *see also* Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law* 164 (Harvard Univ. Press 1918). As it is, the lack of clarity coming out of *Asahi* has created "a great deal of uncertainty as to the extent [manufacturers and sellers of products] are subject to the jurisdiction of various states." Baker & Parise, *supra*, at 120-21.

Nor need there be different tests for "stream-of-commerce" and "non-stream-of-commerce," or for contracts and torts. *International Shoe* and *Hanson* are as much a part of *World-Wide Volkswagen* as they are of *Burger King* and of Justice O'Connor's views in *Asahi*. A putative defendant, itself, must deliberately and with purpose direct its activities at the residents of the forum state. Those activities must be significant and they must create a substantial connection with the forum state.

Respondents seek to ameliorate the negative impact of their position upon our relations with other countries and their civil justice systems by citing to treaties to which the United States is not a signatory and whose jurisdictional provisions apply only to domicilliaries of signatory countries. Resp. Br. 39-40. Respondents quote a restatement provision that merely describes specific jurisdiction. *Id.* at 40-41. Respondents do not deal with the inevitable reaction of other countries to a state court exercising power it lacks to discard constitutional protections for foreign companies in order to protect its citizens from the decision by the United States to participate in foreign trade, to say nothing of its comments about outsourcing and the state of justice in the United Kingdom. And Respondents ignore the example of the roiling of U.S.-Canada relations by exercise of personal jurisdiction. Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 49-50 (2006).

The problem is compounded by the language utilized by the amici States, analogizing Petitioner's position to that of a criminal defendant who has committed mass murder by bombing a building. States Br. 29. Such language only confirms that "the U.S. approach to private international law [is] dominated by the parochial viewpoint of the states." Baker & Parise, *supra*, at 125.

Recognition of foreign judgments by other countries is a complex, delicate matter. The tone in both the New Jersey Supreme Court's opinion and that of the amici States provides ample justification for foreign countries to conclude that state court exercise of jurisdiction over a foreign defendant (except by consent) is presumptively unfair. Already it is the case that most judgments from courts in the United States are not recognized in the Nordic countries and in Austria. Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 Geo. Wash. Int'l L. Rev. 173, 227 (2008). And European countries can now, with reason, treat state long-arm jurisdiction as a "power play" by the state rendering courts. *Id.* at 228.

If state forays into foreign policy through exercising adjudicatory jurisdiction create mischief, the solution is not to grant them the authority that rightly belongs only to the United States. *See* Baker at 122. Alexander Hamilton wrote: "[T]he peace of the WHOLE ought not to be left to the disposal of a PART." *The Federalist* No. 80, at 412-13 (Liberty Fund ed., 2001). If there is a need for jurisdiction over foreign defendants that goes beyond that which is permitted under the Fourteenth Amendment, a need which has not been established before this Court, it is for Congress and the Executive

to vest in the federal judiciary "cognizance of all causes in which the citizens of other countries are concerned." *Id.*

CONCLUSION

The true face of American justice is not that presented by Respondents, their amici and the lower court; it is the figure that fronts the building in which this Court sits. Reversal is in the best interests of Petitioner, the Constitution, and our ability to claim comity among the community of nations.

Respectfully submitted,

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